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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

J. W. GREER, Warden, Menard Correctional Center,

Petitioner,

v.

JOHN STEPHAN PARISIE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether a majority of the United States Court of Appeals for the Seventh Circuit, sitting *en banc*, violated this Court's ruling in *Browder v. Director, Department of Corrections of Illinois*, 434 U.S. 257 (1978), by holding that the court had jurisdiction to accept respondent's appeal.

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OPINIONS BELOW

This Petition seeks review of the decision of the United States Court of Appeals for the Seventh Circuit sitting *en banc*, in which a majority of the court held that the court had jurisdiction to hear the appeal in this cause.

On January 17, 1969, respondent was found guilty of murder by a Sangamon County, Illinois jury. He was sentenced to serve a term of incarceration of 40 to 70 years. On June 26, 1972, the Illinois Appellate Court affirmed respondent's conviction. *People v. Parisie*, 7 Ill.

App. 3d 1009, 287 N.E.2d 310 (1972). Respondent's petition for leave to appeal was denied by the Illinois Supreme Court.

On March 21, 1979, respondent filed a petition for writ of habeas corpus in the United States District Court for the Southern District of Illinois. On December 18, 1979, the district court, in an unpublished order, granted a motion for summary judgment which had been filed by the petitioner. (Appendix O) The respondent, on May 28, 1980; June 2, 1980; and June 30, 1980, filed notices of appeal. (Appendix K) On July 16, 1980, the petitioner filed a motion in the court of appeals to dismiss the appeal for want of jurisdiction. (Appendix J) That motion was denied on August 14, 1980. (Appendix H)

On February 14, 1982, the United States Court of Appeals reversed the decision of the district court and ordered the writ of habeas corpus to issue. *Parisie v. Greer*, 671 F.2d 1011 (7th Cir. 1982) (Appendix G). On June 2, 1982, the court denied the petitioner's petition for rehearing, with suggestion for rehearing *en banc*. (Appendix F)

On June 9, 1982, respondent filed a motion for clarification because the court's June 2, 1982 order did not indicate whether any judge voted to grant the petition for rehearing.

On August 5, 1982, the court granted petitioner's petition for rehearing, with suggestion for rehearing *en banc*. (Appendix B)

The case was reargued, and on March 28, 1983 the court issued an *en banc* decision. Five members of the court held that they had jurisdiction to accept the appeal in this cause; four members voted that they did

not. The court then decided whether, assuming they did have jurisdiction, they could reach the merits of the case. Five members held that the court could reach the merits of the case; three members held that they could not; and one of the judges who had voted against jurisdiction abstained from ruling on this issue. As to the ruling on the merits of the case, four members of the court voted to affirm the decision of the district court denying respondent's petition for writ of habeas corpus; two members of the court voted to reverse the decision of the lower court; two judges voted to remand the case to the lower court; and one judge abstained from ruling on this issue. Thus, because the court was split, 4-4, as to the district court decision, the decision was affirmed. *Parisie v. Greer*, 705 F.2d 882 (7th Cir. 1983). (Appendix A)

Petitioner files this petition for writ of certiorari with respect to the decision of the court of appeals holding that the court had jurisdiction to hear the appeal in this case.

Counsel for respondent has indicated that he also will file a petition for writ of certiorari with respect to issues other than jurisdiction.

JURISDICTION

The court of appeals' decision was rendered on February 18, 1982. The decision of the court, sitting *en banc*, was rendered on March 28, 1983. This petition is being filed within 150 days of the date of the court of appeals' *en banc* decision holding that the court had jurisdiction to hear the appeal in this cause pursuant to this Court's June 24, 1983 order.

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTES AND RULES INVOLVED

28 U.S.C. §1291 reads, in relevant part:

> The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States, ...

28 U.S.C. §2107 reads, in relevant part:

> Except as otherwise provided in this section, no appeal shall bring judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.
>
> * * *
>
> The district court may extend the time for appeal not exceeding thirty days from the expiration of the original time herein prescribed, upon a showing of excusable

neglect based on failure of a party to learn of the entry of the judgment, order or decree.

* * *

Rule 58, Federal Rules of Civil Procedure reads, in relevant part:

Subject to the provisions of Rule 54(b): (1) upon a general verdict of a jury, or upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court; (2) upon a decision by the court granting other relief, or upon a special verdict or a general verdict accompanied by answers to interrogatories the court shall promptly approve the form of the judgment and the clerk shall thereupon enter it. A judgment is effective only when so set forth and when entered as provided in Rule 79(a) . . . .

Rule 4(a)(1), Federal Rules of Appellate Procedure reads, in relevant part:

In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; . . . .

STATEMENT OF THE CASE

On January 17, 1969, respondent was found guilty of murder by a jury in Sangamon County, Illinois. He was sentenced to a term of 40 to 70 years in the Illinois Department of Corrections. On June 26, 1972, the Illinois Appellate Court affirmed respondent's conviction. *People v. Parisie*, 7 Ill. App. 3d 1009, 287 N.E.2d 310. Attempts to secure review by the Illinois Supreme Court and through post-conviction proceedings were unsuccessful.

On March 21, 1979, respondent filed a petition for writ of habeas corpus in the United States District Court for the Southern District of Illinois. On April 28, 1979, the petitioner filed a motion for summary judgment with supporting memorandum of law. On December 18, 1979, the United States District Court, in an unpublished order, granted petitioner's motion for summary judgment. (Appendix O)

On December 27, 1979, respondent filed a motion for extension of time to file a motion for reconsideration of an order. (Appendix N) On February 1, 1980, respondent filed a motion for reconsideration of an order with supporting memorandum of law. (Appendix M) On May 8, 1980, the district court denied respondent's motion to reconsider. (Appendix L)

Respondent filed three notices of appeal: the first on May 28, 1980; the second on June 2, 1980; and the third on June 30, 1980. (Appendix K) On July 16, 1980, petitioner filed a motion with the United States Court of Appeals to dismiss respondent's appeal for want of jurisdiction. (Appendix J) This motion was denied on August 14, 1980. (Appendix H)

On February 14, 1982, the Seventh Circuit Court of Appeals reversed the district court and directed the court to issue a writ of habeas corpus. *Parisie v. Greer*, 671 F.2d 1011 (7th Cir. 1982). (Appendix G) The court did not discuss the jurisdictional question, which had been addressed by the parties in their briefs on appeal.

Petitioner then filed a petition for rehearing and suggestion for rehearing *en banc* again challenging the jurisdiction of the appellate court. On March 16, 1982, respondent was directed to file an answer to petitioner's petition for rehearing. On April 6, 1982, petitioner was permitted to file a reply to respondent's answer.

On June 2, 1982, the court of appeals denied the petition for rehearing in an opinion consisting of three separate concurring opinions. *Parisie v. Greer*, 685 F.2d 1016 (7th Cir. 1982). (Appendix C)

On June 9, 1982, petitioner filed a motion for clarification to determine whether any circuit judge who was not a member of the original panel had voted to allow rehearing of this case *en banc*.

On August 5, 1982, the court, construing petitioner's motion as one for reconsideration, granted petitioner's motion for rehearing *en banc*. (Appendix B)

The court heard reargument on October 19, 1982.

On March 28, 1983, the court entered a *per curiam* order in this cause. *Parisie v. Greer*, 705 F.2d 882 (7th Cir. 1983). (Appendix A)

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

THE RULING OF THE MAJORITY OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, SITTING *EN BANC*, VIOLATED THIS COURT'S HOLDING IN *BROWDER v. DIRECTOR, DEPARTMENT OF CORRECTIONS OF ILLINOIS*, BY ACCEPTING JURISDICTION OF RESPONDENT'S APPEAL.

In the United States Court of Appeals petitioner argued that the court lacked jurisdiction to accept respondent's appeal, due to the fact that respondent had not filed a timely notice of appeal.

The argument was accepted by a four-judge minority and is set forth eloquently and accurately in Judge Wood's dissenting opinion. Appendix A at App. 7 - App. 15. The excellent discussion of this Court's decision in *Browder v. Director, Department of Corrections of Illinois*, 434 U.S. 257 (1978), makes further discussion of petitioner's position with respect to jurisdiction unnecessary. Judge Wood was joined by Judges Bauer, Coffey and Pell in his dissent.

A majority of the court held that the court did have jurisdiction to accept respondent's appeal. Judge Eschbach, joined by Judges Cudahy, Cummings, Posner and Swygert, held that the court did have jurisdiction of the appeal in this cause. Appendix A at App. 17 - App. 20. Judge Swygert proposed an additional theory of jurisdiction, but was supported by only two other judges. Appendix A at App. 24 - App. 34.

It is from Judge Eschbach's theory of jurisdiction, which commanded a five-member majority of the court,

that petitioner seeks this Court's review. Petitioner submits that this theory is violative of this Court's holding in *Browder*, *id.*

As noted in the statement of the case, the district court order granting summary judgment in favor of petitioner was issued on December 18, 1979. It was not until 156 days later, on May 23, 1980, that respondent filed a notice of appeal.

Judge Eschbach looked to 28 U.S.C. § 1291 in support of his jurisdictional theory. § 1291 states that courts of appeals have jurisdiction of appeals from all final decisions of district courts.

In addition, the judge correctly notes that the fact that there was or may not have been a separate document entry of judgment as required by Rule 58, Federal Rules of Civil Procedure, is not especially important, because it would be ridiculous to send a three-year-old case back to the district court in order to have the court go through the formality of entering a separate document evidencing judgment. Appendix A at App. 18. (Judge Wood's dissent further notes that Rule 58 is nonjurisdictional and may be waived by the parties. Appendix A at App. 14, citing *Turner v. Air Transport Lodge 1894*, 585 F.2d 1180 (2d Cir. 1978), *cert. denied*, 440 U.S. 961.)

Judge Eschbach then proceeded to distinguish, and petitioner submits, wrongly, between "temporal limitations" placed upon appeals, and jurisdiction as set forth in § 1291. The judge states that 28 U.S.C. § 2107, which sets forth the time for an appeal to be filed timely, and Rule 4(a)(1), Federal Rules of Appellate Procedure, which does the same, are merely temporal limitations on one's time for appeal. Appendix A at App. 18, App. 20. He then concludes that because there was no sepa-

rate entry of judgment, the time for appeal never began to run. And because the "clock never started running," it is "conceptually impossible for the appeal to be time barred." Appendix A at App. 20.

Petitioner submits that the judge's holding is in direct conflict with this Court's holding in *Browder*, *id.*, and should, therefore, be remedied by this Court. As Judge Wood notes in his dissent, *Browder* clearly provides that where a notice of appeal is not timely filed (despite the fact that a Rule 60(b) motion was filed), the appellate court has no jurisdiction to review the underlying judgment. Appendix A at App. 13, *Browder*, 434 U.S. at 263 n.7.

Put simply, the district court granted summary judgment in favor of petitioner on December 18, 1979. No notice of appeal was filed until May of 1980. The appellate court had no jurisdiction over this untimely appeal, despite the fact that there was not the "waiveable" formality of the entry of judgment on a separate document. See, *Fuente v. Central Electric Cooperative, Inc.*, 703 F.2d 63 (3rd Cir. 1983); *Equal Employment Opportunity Commission v. K-Mart Corporation*, 694 F.2d 1055, 1060 (6th Cir. 1982); *Smith v. Mine Safety Appliances Company*, 691 F.2d 724 (5th Cir. 1982); and *Henry v. Estelle*, 688 F.2d 407 (5th Cir. 1982).

The appellate court had no jurisdiction to hear this appeal, in that there was not a timely notice of appeal filed nor was there a timely motion filed which would have stayed the appeal period.

The majority opinion holding that there was jurisdiction should be reversed and petitioner respectfully requests that this Court grant certiorari toward that end.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be allowed to review the decision of the United States Court of Appeals for the Seventh Circuit, sitting *en banc*.

Respectfully submitted,

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